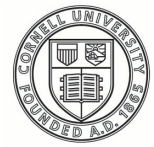

11-16-1990

State of New York Public Employment Relations Board Decisions from November 16, 1990

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from November 16, 1990

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WILLIAM STANLEY,

Charging Party,

-and-

CASE NO. U-11693

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Respondent.

WILLIAM STANLEY, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of William Stanley to the dismissal, as deficient, of his improper practice charge against the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). Stanley alleges that CSEA violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it expelled him from membership, assertedly based upon his support of a competing employee organization, and conducted an "undemocratic" process for doing so.

The Director dismissed the charge as deficient upon the ground that this Board is without jurisdiction "to entertain complaints about internal union discipline or other internal union affairs which neither affect an employee's terms and conditions of employment nor violate any fundamental purpose

or policy of the Act."[1]

Stanley's exceptions appear to assert that CSEA has a statutory duty to accept him as a member if he elects to join, pursuant to §202 of the Act. While §202 provides that "public employees shall have the right to form, join and participate in, or to refrain from forming, joining or participating in, any employee organization of their own choosing", we have not held the right to join an employee organization to be absolute and completely beyond the employee organization's control. An employee's right to join an employee organization must, as a matter of reason and logic, be limited by and subject to the employee organization's membership requirements.[2] So long as those membership requirements do not conflict with the purposes and policies of the Act, and do not affect terms and conditions of employment, their application is beyond our jurisdiction.

Stanley argues that his expulsion from membership in CSEA has resulted in the loss of life insurance policies available to CSEA members, and has resulted in his exclusion

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[1]CSEA (Stanley), 23 PERB ¶4562 (1990), quoting from this Board's decision in CSEA (Liebler, Grzedzicki and Hejna), 17 PERB ¶3072, at 3110 (1984).

[2]For example, we do not construe §202 of the Act to preclude an employee organization from conditioning membership upon payment of dues, membership in a bargaining unit represented by it, acting in accordance with its best interests or other such noninvidious criteria.

from the contract ratification and union officer election processes. We find that while these matters are consequences of the loss of CSEA membership, the grounds for expulsion from membership referenced by Stanley do not affect terms and conditions of employment and do not give rise to a violation of §209-a.2(a) of the Act. This is so because the establishment of rules and qualifications for membership in an employee organization does not, per se, constitute an improper interference with the right to join an employee organization. Based upon the foregoing, the decision of the Director is affirmed, and IT IS HEREBY ORDERED that the charge be, and it hereby is, dismissed.

DATED: November 16, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION,
NASSAU LOCAL 830, AFSCME, LOCAL 1000,
AFL-CIO,

Charging Party,

CASE NO. U-10629

-and-

COUNTY OF NASSAU,

Respondent.

NANCY E. HOFFMAN, ESQ. (JEROME LEFKOWITZ, ESQ., of Counsel), for Charging Party

BEE, DeANGELIS & EISMAN (PETER A. BEE, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on the exceptions of the Civil Service Employees Association, Nassau Local 830, AFSCME, Local 1000, AFL-CIO (CSEA) to the decision of an Administrative Law Judge (ALJ) which dismissed its charge against the County of Nassau (County).

CSEA charged that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally issued a work order changing its procedure for scheduling certain time-off requests made by unit employees. After a review of the hearing transcript, the ALJ granted the County's motion to

dismiss which was made at the end of CSEA's direct case.[1/] The ALJ determined that the parties' then-existing contract covered the subject matter of the improper practice charge such that PERB had no jurisdiction pursuant to §205.5(d) of the Act. Alternatively, the ALJ, on her own motion, determined that the charge was untimely upon a finding that the only witness at the hearing testified that the departmental order was "read to all unit employees, including him," on September 9, 1988, more than four months before the charge was filed.

For the following reasons, we determine that the ALJ's decision must be reversed and the case remanded.

As to the jurisdictional issue, §205.5(d) of the Act denies PERB the power, inter alia, to entertain a claim of violation of a collective bargaining agreement unless the violation of the agreement otherwise constitutes an improper practice. Therefore, unless the agreement is a reasonably arguable source of right to the charging party with respect to the same subject matter as the improper practice charge, no contract violation may be established, and our jurisdiction is clear. That an agreement may "cover" the issue raised in an improper practice charge is not enough to divest PERB of jurisdiction over that charge pursuant to §205.5(d) Act. Of course, if the agreement is a

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[1/]The motion was premised upon CSEA's alleged failure to prove a change in practice and PERB's lack of jurisdiction.

source of right to the employer, an issue of waiver of the right to negotiate may be presented. However, waiver of the right to negotiate is a matter which necessarily lies within PERB's jurisdiction. A determination whether a party has waived the right to negotiate an issue goes to the disposition of the charge on its merits, but not to PERB's power to reach those merits.

A jurisdictional issue can be raised, however, even if the agreement does not address specifically the particular allegations of the improper practice charge if the agreement is a source of right to the charging party with respect to the subject matter of the charge.[2/] Therefore, that CSEA's contract does not specify a notice period for some of the types of leave covered by the work order in issue does not mean that no jurisdictional issue is presented.

Our necessary jurisdictional determination is aided by a charging party's actions and the results occasioned thereby. In this case, CSEA grieved the County's order, alleging that it violated three sections of the parties' then-existing agreement. Although the pendency of the grievance might have supported a deferral of the jurisdictional issue to the parties' negotiated

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[2/] See, e.g., County of Nassau, 16 PERB ¶3043 (1983).

procedure pursuant to our decision in Herkimer County BOCES,[3] the advisory grievance board established by the parties' agreement denied the grievance before the hearing on the improper practice charge. A jurisdictional deferral is accordingly moot. Although the grievance board's disposition of the grievance is entitled to some weight in our consideration of the jurisdictional issue, there is nothing in the award to even suggest that there was any provision in the contract which was a source of right to CSEA in relevant respect. The grievance board decided only that no provision of the contract had been violated. The award reflects the grievance board's conclusion that the contract authorized the County's issuance and implementation of the order in issue. That interpretation of the contract may be material to a waiver defense, but it is immaterial to a jurisdictional defense. Our own review of the contract persuades us that the contract is not a source of right to CSEA in any relevant respect. The charge is therefore not subject to dismissal on jurisdictional grounds pursuant to Act §205.5(d),

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[3] 20 PERB ¶3050 (1987). Although the last step of the parties' grievance procedure is nonbinding, we do not view the advisory nature of the determination to be an impediment to a Herkimer deferral provided the deferral of a determination concerning our jurisdiction is otherwise appropriate. Herkimer is premised upon our belief that the parties should use their negotiated procedures in the resolution of contract questions.

but raises instead statutory issues which lie within our jurisdiction to determine.

As to the timeliness of the charge, §204.7(1) of our Rules of Procedure (Rules) precludes the dismissal of a charge as untimely filed, whether on motion by a party or by an ALJ sua sponte, unless the untimeliness of the charge is first revealed at a hearing.[4/] In that respect, our review of the record does not persuade us that the charge is in fact untimely. The one witness who has testified thus far testified that he had not received a copy of the order in issue and could not recall when he first learned of it. Although the witness may have admitted that work orders are often read at line-ups,[5/] he had no recollection as to whether this particular order was read to unit employees. Untimeliness may be suggested by the date of the order, which is outside the four-month filing period, but by

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[4/]Section 204.7(1) Rules provides as follows:

> A motion may be made to dismiss a charge, or the administrative law judge may dismiss a charge on the ground that the alleged violation occurred more than four months prior to the filing of the charge, but only if the failure of timeliness was first revealed during the hearing. An objection to the timeliness of the charge, if not duly raised, shall be deemed waived.

[5/]The testimony is also arguably subject to an interpretation that there are often line-ups, not that work orders are often read at line-ups.

itself, the order's date does not affirmatively establish that CSEA's charge is untimely because it is presently unknown whether the order was issued as dated or whether or when it was first announced to CSEA's agents. As the hearing did not establish a failure of timeliness, the ALJ erred in dismissing the charge for that reason. Section 204.7(l) of the Rules defines and limits the ALJ's power to dismiss a charge on his or her own motion and the ALJ's dismissal in this case exceeded those limitations.

For the reasons set forth above, the ALJ's decision is reversed and the case is remanded for further proceedings consistent with our decision and order herein.

DATED: November 16, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-10500

CITY OF BUFFALO (POLICE DEPARTMENT),

Respondent.

WYSSLING, SCHWAN & MONTGOMERY (W. JAMES SCHWAN, ESQ., of Counsel), for Charging Party

SAMUEL F. HOUSTON, ESQ., Corporation Counsel (STANLEY J. SLIWA, ESQ., Assistant Corporation Counsel, of Counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on the exceptions of the City of Buffalo (Police Department) (City) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Buffalo Police Benevolent Association, Inc. (PBA) which alleged that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it issued new departmental rules in September 1988.

The ALJ determined that the City's unilateral promulgation in September 1988 of a document entitled "Rules and Regulations for the Government and Discipline of the

Buffalo Police Department" (Department Rules) changed its existing departmental rules and that those changes in five respects embody terms and conditions of employment which the City was required to bargain with the PBA.

The City's exceptions as filed contest the ALJ's findings regarding a change in practice and policy, her negotiability determinations in four respects[1/] and her rejection of the City's argument that its contract with the PBA privileged the promulgation of the Department Rules. In the brief accompanying its exceptions, the City adds jurisdictional, timeliness and abandonment defenses. Each of these defenses was raised in the City's brief to the ALJ. However, of the three, only a timeliness defense was pleaded in its answer, although the abandonment claim was pursued by motion at the hearing. Moreover, the PBA's brief in opposition to the exceptions responds to each of the stated grounds for exception except the alleged untimeliness of the charge.

Under the foregoing particular circumstances, we will consider each of the City's exceptions. However, the City and all practitioners are reminded that §204.10 of our Rules of Procedure (Rules) which requires specification of exceptions in a written statement and the waiver which

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[1/]The City did not file exceptions to the ALJ's holding that §3.10(b) of the Department Rules was mandatorily negotiable.

results from noncompliance. Our Rules contemplate that all exceptions raised by a party will be incorporated into a single statement of exceptions denominated as such and that any accompanying memorandum of law will only present argument in support of such enumerated exceptions.

The City's contract waiver and jurisdiction defenses are each grounded upon Articles XXVII and XXVIII of the parties' current contract. Article XXVIII is a management rights clause and Article XXVII subjects the contract provisions to "applicable controlling laws" and to the City's Common Council's "appropriation of funds." There being nothing in either clause which is a source of right to the PBA with respect to the subject matter of the improper practice charge, we have jurisdiction over the charge under §205.5(d) of the Act.[2/] The contract clauses raise an arguable waiver issue which is within our jurisdiction and which was correctly decided by the ALJ. The City's disciplinary rights, as retained by its management rights clause, must be exercised "in accordance with law." The City's unilateral change in terms and conditions of employment was not consistent with its duty to negotiate and was, therefore, not effected "in accordance with law".

The City also maintains that its 1988 Department Rules

[2/]See our more extensive discussion of contract jurisdiction in County of Nassau, 23 PERB ¶3051, also decided this date.

recodified existing rules and regulations and did not embrace mandatorily negotiable subject matters. After tracing the history of the departmental rules, the ALJ determined that 1988 Department Rules effected substantial changes in the old rules in certain respects, but not in several others. As to those rules which were demonstrably changed, the ALJ also concluded that the changes were mandatorily negotiable.

We have examined the City's arguments in support of its exceptions in these respects and affirm the ALJ's determination that sections 1.1(a), 3.4, 6.4 and 6.9 of the 1988 Department Rules represented changes in existing departmental policies or practices and that those rule changes are mandatorily negotiable. The grounds for the imposition of discipline are mandatorily negotiable.[3/] An employee's violation of any of the Departmental Rules exposes the employee to discipline. When the City changed those rules, it necessarily changed the bases for the imposition of discipline against an employee, and thereby subjected itself to a duty to bargain.

The City's remaining exceptions require little discussion. The PBA's failure to object to the City's past changes in its departmental rules does not waive its right to

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[3/] See, e.g., Binghamton Civil Service Forum v. City of Binghamton, 44 N.Y.2d 23, 11 PERB ¶7508 (1978).

object to these or future[4/] changes. The charge was timely filed within four months of the promulgation of the 1988 Department Rules. The City's abandonment defense rests on the PBA's initial failure to file an offer of proof as instructed by the ALJ. The PBA's offer of proof was filed, however, in accordance with the ALJ's last instruction. We consider her decisions to extend the original due date for the offer, her acceptance of the PBA's offer of proof as filed and her decision to process the charge thereafter to be matters within an ALJ's discretion.

We affirm the decision of the ALJ that the City violated §209-a.1(d) of the Act by its promulgation of the 1988 Department Rules and order that the City:

1. Rescind rule sections 1.1(a), 3.4, 3.10(b), 6.4 and 6.9 from the "Rules and Regulations for the Government and Discipline of the Buffalo Police Department" as promulgated in September 1988.
2. Expunge from its files any documents relating to any unit employee's failure to comply with any of the rule sections

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[4/] County of Tompkins, 10 PERB ¶3066 (1977).

enumerated in the preceding paragraph.

3. Sign and post notice in the form attached at all places normally used to post notices of information to unit employees.[5/]

DATED: November 16, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

[5/]We have deleted that part of the ALJ's recommended order which requires the City to negotiate in good faith in keeping with our belief that such orders are unnecessary in a unilateral change case. See Middle Country CSD, 23 PERB ¶3045 (October 22, 1990).

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Buffalo Police Benevolent Association, Inc. that the City of Buffalo (Police Department):

1. Will rescind rule sections 1.1(a), 3.4, 3.10(b), 6.4 and 6.9 from the "Rules and Regulations for the Government and Discipline of the Buffalo Police Department" as promulgated in September 1988.

2. Will expunge from its files any documents relating to any unit employee's failure to comply with any of the rule sections enumerated in the preceding paragraph.

.....City of Buffalo.....

Dated..... **By**.....
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCHESTER FIRE FIGHTERS ASSOCIATION, LOCAL 1071, IAFF,

Charging Party,

-and- CASE NO. U-10206

CITY OF ROCHESTER,

Respondent.

REDMOND & PARRINELLO (JOHN R. PARRINELLO, ESQ., of Counsel), for Charging Party

LOUIS N. KASH, ESQ., Corporation Counsel (BARRY C. WATKINS, ESQ., and CHAD R. HAYDEN, ESQ.), for Respondent

BOARD DECISION AND ORDER

The Rochester Fire Fighters Association, Local 1071, IAFF (Union) excepts to the Administrative Law Judge's (ALJ) dismissal of its charge against the City of Rochester (City) in which the Union alleges that the City violated §209-a.1(c) of the Public Employees' Fair Employment Act (Act) when it bypassed Lieutenant Richard P. Mattice for promotion to Captain because he exercised protected rights in his capacity as Union Secretary.

The ALJ dismissed the charge on a finding, which rests substantially upon judgments as to witness credibility, that the Union had not established that Mattice's protected activities were the substantial motivating factor for his being denied a promotion and, therefore, that it had not met

the necessary standard of "but for" causation.

The Union lists 11 numbered exceptions in a 45-page submission which excepts to the ALJ's entire decision. The Union's principal argument is that there was persuasive circumstantial evidence of the City's improper motivation and that the City's claim to have denied Mattice the promotion based upon an assessment of qualifications was pretextual. More specifically, the Union's exceptions are directed to the ALJ's conclusion that there was insufficient evidence of improper motivation, her credibility resolutions, two evidentiary rulings regarding the admissibility of opinion testimony and an alleged misplaced reference to our earlier decision in City of Rochester[1/] regarding the use of union release time.

The ALJ's 31-page decision issued after 7 days of hearing which produced a record in excess of 1,000 pages, involved several witnesses and exhibits and voluminous briefs with reply. Having reviewed the ALJ's decision, searched the record on which it is based, and analyzed the Union's exceptions, we find no reason to disturb the ALJ's findings of fact or the inferences she either drew or rejected. Whether these inferences stemmed from the sequence and timing of events, inconsistencies in testimony, the City's appointment practice, Fire Chief Heuther's relationship with

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[1/] 19 PERB ¶3081 (1986).

Mattice or his alleged animus, we find no reason why the ALJ's decision should not be sustained. Regarding the credibility resolutions in particular, we have stated that an ALJ's credibility resolutions are entitled to substantial deference and "the greatest weight."[2/] Although on rare occasion we have reversed an ALJ's credibility resolution, we have done so only when the objective evidence in the record compelled the conclusion that the ALJ's determination was manifestly incorrect,[3/] a conclusion which we cannot reach on this record.

The ALJ's evidentiary rulings excluded a unit employee's opinion regarding Mattice's leadership, aggressiveness and ability to handle the Captain's job and his opinion as to why Mattice was not appointed to that position. The ALJ's ruling on the exclusion of the employee's opinion was plainly correct. An articulation of opinion in this regard would have constituted nothing more than the witness' expression of his belief as to how the case should be decided, a statement without value to anyone deciding the case. Without suggesting that the ALJ erred in the first noted evidentiary

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[2/] Captain's Endowment Ass'n, 10 PERB ¶3034, at 3065 (1977). See also Hempstead Housing Auth., 12 PERB ¶3054 (1979).

[3/] City of Long Beach, 13 PERB ¶3008 (1980), conf'd, City of Long Beach v. PERB, 82 A.D.2d 1016, 14 PERB ¶7018 (1st Dep't 1981); Board of Education of the CSD of the City of New York, 21 PERB ¶3056 (1988), conf'd, Board of Education of the CSD of the City of New York v. PERB, ____A.D.2d ____, 23 PERB ¶7018 (2d Dep't, October 15, 1990).

ruling,[4] any error was harmless. One employee's opinion regarding another's qualifications could not have affected the ALJ's determination regarding Heuther's motive in bypassing Mattice for promotion.

The exception directed to the ALJ's citation to our earlier City of Rochester decision is similarly dismissed. The reference to that case was not material to the ALJ's disposition of the charge, whether or not misplaced.

Based upon the foregoing, the ALJ's decision is affirmed and IT IS HEREBY ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: November 16, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

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[4]Opinion testimony by lay witnesses is generally inadmissible over objection in New York. E. Fisch, New York Evidence, §§361-75, at 235-60 (2d ed. 1977). As our hearings are not governed by strict rules of evidence, Rules of Procedure §204.7(f), we believe that the ALJ could have received the opinion testimony in her discretion.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 687, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3549

VILLAGE OF ALEXANDRIA BAY,

Employer,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Teamsters Local 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full- and part-time police officers and all seasonal full- and part-time police officers,

Excluded: Chief of Police, Temporary Acting Chief of Police and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 16, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION, NO. 529,

Petitioner,

-and-

CASE NO. C-3704

TOWN OF THURSTON,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union, No. 529 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Laborers, Truck Drivers, Equipment Operators and Mechanics.

Excluded: Supervisory Personnel, Clerical, Guards and all others excluded by the Act.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union, No. 529. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 16, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member